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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the instant challenge to the Secretary of Commerce's current plan for the year 2000 census presents a justiciable controversy satisfying the requirements of Article III of the Constitution.

2. Whether the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

3. Whether the Secretary's plan for the 2000 census violates either Article I, Section 2 of the Constitution, or Section 2 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William Jefferson Clinton, President of the United States; the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census. The appellees, who were plaintiffs in the district court, are Matthew Glavin; Robert Barr; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresanta; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn; and Cobb County, Georgia.[1]

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[1] Four groups of litigants—Richard A. Gephardt, et al.; the Legislature of the State of California, et al.; the City of Los Angeles, et al.; and the National Korean American Service & Education Consortium, Inc., et al.—moved for leave to intervene as defendants in the district court. In addition, appellees sought leave to file an amended complaint naming additional plaintiffs. The district court did not rule on either the motions to intervene or the request to include additional plaintiffs. Although the court's opinion is not entirely clear on this point, the list of plaintiffs and defendants included at the beginning of the opinion (see App., *infra*, 1a) indicates that the district court did not regard either the putative intervenors or the putative additional plaintiffs as parties to the case. But see *id.* at 2a ("Now before the Court are the defendants' and intervenor-defendants' motions to dismiss the plaintiffs' complaint."); *id.* at 11a (referring to Delaware County, Pennsylvania, as though it were a plaintiff, even though Delaware County is not included in the list of plaintiffs at the outset of the opinion).

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-23a) is not yet reported.

JURISDICTION

The opinion and order of the district court were entered on September 24, 1998 (App., *infra*, 1a-23a). A notice of appeal (App., *infra*, 37a-39a) was filed on September 25, 1998. The jurisdiction of this Court is invoked under Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2482.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at App., *infra*, 24a.

2. Section 2 of the Fourteenth Amendment to the United States Constitution is reproduced at App., *infra*, 24a-25a.

3. Section 2a of Title 2, United States Code, is reproduced at App., *infra*, 25a-27a.

4. Sections 141 and 195 of Title 13, United States Code, are reproduced at App., *infra*, 27a-30a.

5. Section 209 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2480-2483, is reproduced at App., *infra*, 31a-36a.

STATEMENT

This case involves a statutory and constitutional challenge to the Commerce Department's plan to employ statistical sampling in conducting the decennial census for the year 2000. In the proceedings below, the District Court for the Eastern District of Virginia held that the Department's plan is inconsistent with the Census Act and is therefore unlawful. App., *infra*, 1a-23a. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. On September 10, 1998, this Court noted probable jurisdiction in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, No. 98-404, which held the

Secretary's plan to be invalid on essentially the same basis.

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" (the Apportionment Clause). It also directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). *Ibid.* In addition, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

2. The Census Act states that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. 141(a). The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported by the Secretary to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within one week after the beginning of the first Session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455

(1992). Within 15 days after receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. 2a(b) (Supp. II 1996).

The Census Act provides that the Secretary may conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Act further states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195.

"[T]he sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." 1998 Appropriations Act, § 209(a)(2), 111 Stat. 2481. The decennial census has historically been used, however, to collect a variety of information in addition to the state-level population figures that are used in apportioning Representatives among the States. In particular, the Census Act provides for the collection of population figures for geographical subdivisions within the States. 13 U.S.C. 141(c). The Act requires that "[t]abulations of population" for substate areas "shall be completed by [the Secretary] as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State." *Ibid.*

3. Much of the factual background of this case is set forth in the jurisdictional statement in *United States Department of Commerce, et al.* v. *United States House*

of Representatives, et al., No. 98-404. As that jurisdictional statement explains, the Department of Commerce has concluded that use of statistical sampling mechanisms in the conduct of the 2000 decennial census will increase the accuracy of the census while reducing its cost. As directed by statute, see Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217, the Department forwarded to Congress a detailed report describing the methods by which it plans to conduct the 2000 census. See *U.S.* Bureau of the Census, Department of Commerce, *Report to Congress–The Plan for Census 2000* (Aug. 1997) (*Report to Congress*).[2]

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[2] Two forms of statistical sampling are at issue in this litigation. First, the Commerce Department intends to use sampling in the Nonresponse Follow-Up (NRFU) phase of the census. In the 1990 census, approximately 65% of all U.S. households returned the census forms sent to them by mail. Census Bureau enumerators visited non-responding households as many as six times before relying on other means to attempt to ascertain the number of persons residing there. For the 2000 census, the Census Bureau plans to secure information from a randomly selected sample of non-responding households; its objective is to obtain responses through either mail response or NRFU from 90% of the housing units in each census tract. The Bureau will then determine the likely number of persons living in other non-responding units based on the sample data. *Report to Congress* at 26-29.

Second, after the initial phase of the census, the Commerce Department plans to conduct a survey of approximately 750,000 housing units furnishing a representative sample of a wide variety of demographic groups, defined by such categories as race, age, urban or rural place of residence, and status as a homeowner or renter. By comparing the results of that survey to those of the initial phase of the census, the Department will assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. Based on the results of the sample, the Bureau will then determine population figures for

After receiving the *Report to Congress*, Congress enacted the 1998 Appropriations Act. Section 209(b) of that Act provides that

> [a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

111 Stat. 2481. Section 209(c)(2) states that the *Report to Congress*, together with the Commerce Department's Census 2000 Operational Plan, "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." 111 Stat. 2482. Section 209(e)(1) states that any civil action brought pursuant to the Act shall be heard by a three-judge district court, whose decision is reviewable by appeal directly to this Court. *Ibid.*

4. The plaintiffs in this case (appellees in this Court) are 16 individuals and Cobb County, Georgia. They filed suit pursuant to the judicial review provision of Section 209(e)(1), contending that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act; Article I, Section 2 of the

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States and political subdivisions nationwide. *Report to Congress* at 29-32.

Constitution; and Section 2 of the Fourteenth Amendment. President William Jefferson Clinton, the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau (collectively Commerce Department) were named as defendants. The Commerce Department moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. Appellees moved for summary judgment. The district court denied the Commerce Department's motion to dismiss and granted the appellees' motion for summary judgment. App., *infra*, 1a-23a.

a. The district court concluded that the appellees "meet the [Article III] requirements of having a personal stake in the outcome of the controversy." App., *infra*, 10a. The court identified four distinct categories of cognizable injuries. First, the court stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." *Id.* at 11a. Second, the court accepted the allegation "that the plan will dilute the voting strength of [appellees] at the intrastate level" because "several [appellees] reside in counties whose relative population will be diminished by operation of the Department's plan." *Ibid.* Third, the court held that appellees had properly alleged a cognizable injury in the form of loss of federal funding to the States and/or substate areas in which they reside. *Id.* at 11a-12a. Finally, the district court concluded that the appellees would be injured by the Commerce Department's plan for the 2000 census because if the plan is implemented and the census is subsequently declared invalid by a reviewing court,

"any elections in 2002 will have to be held on the basis of an incorrect number of representatives and malapportioned districts which reflect the 1990 census results." *Id.* at 12a. The court further held that the alleged injuries were sufficiently immediate and certain to occur to satisfy Article III requirements, *id.* at 7a-9a, and that those injuries were properly attributable to the Commerce Department, *id.* at 14a-15a.[3]

b. On the merits, the district court held that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act. The court stated

[3] With respect to the first three categories of harms, appellees' contention that they would be injured by implementation of the Secretary's plan depends on the proposition that particular States or political subdivisions would be credited with a larger share of the country's population under a year 2000 census that did not employ statistical sampling techniques. Appellees submitted the affidavit of Dr. Ronald E. Weber, who expressed the view that such areas can presently be identified with a reasonable degree of confidence. Dr. Weber stated, in particular, that "[c]omparing seat allocations based on the 2000 projected populations under a traditional enumeration with 2000 projected populations under the Department's Plan, the States which stand a substantial likelihood of losing a seat are Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin." Weber Affidavit at 12. The government submitted its own affidavits contesting Dr. Weber's methodology and conclusions. See GXs 13, 14. One of the government's affiants "conclude[d] that no one can predict the state-by-state population of the United States as of April 1, 2000 with the exactitude required by the Method of Equal Proportions." GX 13 at 2. The government also pointed out that appellees, having moved for summary judgment on the merits, bore the burden not only of alleging but also of establishing with factual specificity their standing to sue. See Defendants' Reply Memorandum in Support of Motion to Dismiss at 13 n.6, 45 (filed May 22, 1998). The district court did not address this latter point.

that "Congress has spoken precisely to the question of statistical sampling by the Department and, in plain language, prohibited the use of this methodology to derive the population used for purposes of congressional apportionment." App., *infra*, 16a-17a. The court construed the opening proviso of 13 U.S.C. 195 as unambiguously prohibiting the use of sampling for apportionment purposes. App., *infra*, 18a-19a. Insofar as that prohibition might conflict with the affirmative grant of authority to use sampling contained in 13 U.S.C. 141(a), the court reasoned, Section 195 is the more specific of the two provisions and should therefore prevail. App., *infra*, 20a. The court concluded that "the only plausible interpretation of the plain language and structure of the Act is that Section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes." *Id.* at 21a.

c. Because the district court concluded that the Secretary's plan for the 2000 census violates the Census Act, it declined to resolve the question whether the plan is consistent with Article I, Section 2, Clause 3 of the Constitution. App., *infra*, 16a-17a & n.2, 21a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Congress has vested this Court with direct appellate jurisdiction over district court decisions in suits challenging the Commerce Department's plan for the year 2000 decennial census. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. This case falls squarely within the Court's appellate jurisdiction under that statutory provision. On September 10, 1998, this Court noted probable jurisdiction in *United States Department of Commerce, et al.* v. *United States*

House of Representatives, et al., No. 98-404. That case also involves a suit brought under Section 209(e)(1) of the 1998 Appropriations Act challenging the Commerce Department's plan for the 2000 census.

The instant case involves essentially the same statutory and constitutional challenges to the Commerce Department's plan as does the suit brought by the House of Representatives. The district court in each of the two cases concluded that the plan violates 13 U.S.C. 195 and is therefore invalid. If it were clear that the suit brought by the House is justiciable, the Court could simply hold the jurisdictional statement in the instant case pending its disposition of No. 98-404.

As our jurisdictional statement in No. 98-404 explains (at 13-15), however, we do not believe that the suit filed by the House of Representatives satisfies the requirements of Article III. Although we believe that the appellees in the instant case also lack standing to sue, the jurisdictional issues presented by the two cases are quite distinct. A holding by this Court that the suit brought by the House of Representatives does not satisfy the justiciability requirements of Article III therefore would not necessarily require the conclusion that this suit is also nonjusticiable. As our jurisdictional statement in No. 98-404 indicates (at 12-13), a prompt ruling by this Court as to the legality of the plan for the 2000 census would have significant practical advantages, if the Court were to determine that such a ruling can be issued consistent with the requirements of Article III. The Court should therefore note probable jurisdiction in this case as well.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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OCTOBER 1998

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 98-207-A

MATTHEW GLAVIN, ET AL., PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL., DEFENDANTS

[Filed: Sept. 24, 1998]

MEMORANDUM OPINION

This case comes before the Court on the defendants' motion to dismiss and the plaintiffs' motion for summary judgment. Plaintiffs, Matthew Glavin, Robert Barr, Gary A. Hofmeister, Stephen Gons, James F. McLaughlin, David H. Glavin, John Taylor, Deborah Hardman, Craig Martin, Jim Lacy, Judy Cresanta, Helen V. England, Amie S. Carter, Robert Richard Dennik, Michael T. James, William J. Byrn, and Cobb County, Georgia, seek summary judgment against Defendants, William J. Clinton, The United States Department of Commerce; William M. Daley; Bureau of the Census and James F. Holmes in this action challenging defendants' plan for the 2000 census.

Plaintiffs claim that using statistical sampling to supplement the head count enumeration used to apportion representatives among the states violates the Census Act of 1976, 13 U.S.C. §§ 21, 195, and Article I, Section 2, Clause 3 of the Constitution. Plaintiffs seek a declaration that statistical sampling is unlawful and/or unconstitutional and an injunction preventing defendants from using statistical sampling in the 2000 census. The defendants seek dismissal of Plaintiffs' complaint on the grounds this case is not ripe for adjudication and that the plaintiffs lack personal standing to be parties in this case.

Now before the Court are the defendants' and intervenor-defendants' motions to dismiss the plaintiffs' complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, and Plaintiffs' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For reasons stated below, the motions to dismiss will be denied and plaintiffs' motion for summary judgment will be granted.

I. BACKGROUND

Since 1790, the United States government has followed the constitutional command of Article I, Section 2, Clause 3 by carrying out a decennial census to allocate seats in the House of Representatives. In 1990, the Census Bureau instituted new outreach and promotion efforts to count the entire population, spending over $2.6 billion. The 1990 estimated net undercount rate was 1.6%. Certain minorities, notably African-Americans and Hispanics, had higher undercount rates than the population as a whole. Children and those living in rural areas also were differentially undercounted.

In response to the persistent undercount, in November 1990, the Secretary of Commerce established the "Task Force for Designing the Year 2000 Census and Census Related Activities for 2000-2009." Also, Congress passed the Decennial Census Improvement Act of 1991 directing the National Academy of Sciences to study the means by which the Government could achieve the most accurate population count possible, specifically considering the appropriateness of using sampling methods. The Academy found that statistical sampling should be used both for non-response follow-up and to increase accuracy. Relying on the results of the studies, the Census Bureau formulated its own plan for Census 2000.

The Secretary of Commerce's census plan will include sampling in at least three different programs of Census 2000. First, the Bureau will use sampling in the Postal Vacancy Check program, to verify housing units identified as vacant by the United States Postal Service. Second, the Census Bureau will use statistical sampling techniques to complete its traditional enumeration, an operation referred to as "Non-response Follow-up" or "NRFU." Third, the Bureau will use sampling techniques to improve the accuracy of Census 2000 with a post-census survey, an operation the Bureau calls "Integrated Coverage Measurement" or "ICM." The Bureau's plan to use sampling in the Postal Vacancy Check is not in dispute in this lawsuit.

Over 60% of households mailed back their questionnaires in 1990, and the Bureau expects a similar mail response rate in 2000. In 1990, the Census Bureau sent enumerators to all non-responding households before relying on proxy data (information obtained from neighbors) or imputation data (computer-inferred data which are based on the assumption that the household

has characteristics similar to other residences in the area). To account for those housing units that do not mail back forms in 2000, the Bureau's plan is to select at random the number of households that need to be counted in order to count 90 percent of the addresses in a census tract to whom questionnaires were mailed.

After the 90 percent goal has been reached, the Department will then add to its actual population count an estimate of the number of people in the households that were not selected for non-response follow-up. Thus, ten percent of the non-response follow-up units will not be physically counted. In making this estimate, the Department will not assume that the overall composition of these persons reflects the 90 percent of the people who were actually counted, but rather the plan is predicated on the assumption that these virtual persons will mirror the racial and ethnic composition of the persons who are identified in non-response follow-up.

The second phase of the enumeration is the Integrated Coverage Measurement survey, in which Census Enumerators will conduct interviews in a random population sample, separate from each state, to determine what proportion of the people living in the sample blocks were included in the initial enumeration. The Census Bureau's plan will classify each of the country's seven million blocks into groups known as sampling strata based on the characteristics of the block's residents according to the 1990 Census results, such as racial and ethnic composition, proportion of homeowners to renters, etc. The Bureau will select a controlled scientific sample of these blocks and enumerators will then conduct an independent second roster and ICM interview.

Each person and each enumeration is then assigned to a unique poststratum, a group of persons having similar probability of having been enumerated in the initial phase.[1] The Bureau will then estimate the number of persons in each poststratum who were correctly counted, missed, or over counted in the initial data collection phase. The Bureau will use that estimate to create an adjustment factor for each poststratum, and then multiply the number of people counted in each poststratum in the initial data collection phase by the appropriate adjustment factor to adjust the census count synthetically. Once the adjustment factors have been applied to each poststratum in a block, the statistically adjusted population figures for each block will be aggregated at the tract, county, state and national levels. This will be the reported population number used for Congressional apportionment and other purposes.

In its Report to Congress, the Bureau estimated that the total undercount of the national population in 2000 would be 1.9% if it relies on traditional methods of enumeration alone. The expected error rates for the Bureau's proposed plan vary according to the geographic level—with higher error rates at lower levels of geography (blocks, for example) and lower error rates at higher levels of geography (counties and states, for example). The Bureau expects that by using statistical sampling, it can achieve a lower error at the national, state, and Congressional district levels than it can without using sampling.

Employing statistical processes to include those who would be left out of the 2000 Census has sparked fierce

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[1] A poststratum could be all people within a state having the same sex, age, and racial/ethnic group.

debate within the political branches of the federal government since at least 1990, when it became apparent that the manner of enumerating used in the last two decennial censuses failed to ameliorate the differential undercount. In 1997, Congress attempted to amend 13 U.S.C. § 141(a) to provide: "[n]othwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in [C]ongress among the several States." H.R. 1469, tit. VIII (b)(1), at 65. The President vetoed this bill, in part due to the prohibition of the use of sampling in Census 2000.

Following the veto, Congress passed legislation requiring the Census Bureau to provide the Report to Congress. *See*, Pub. L. 105-18, tit. VIII, 111 Stat. 158, 217 (1997). After receiving the Report to Congress, Congress and the President continued negotiations regarding sampling in the context of the legislation necessary to fund the Commerce Department for Fiscal Year 1998. The political branches eventually reached a compromise allowing the funding of the Commerce Department for Fiscal Year 1998. That compromise is embodied in Sections 209 and 210 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2480-87 (1997). The Act contains separate provisions relating to lawsuits to challenge the use of sampling in Census 2000.

Section 209(b) of the Appropriations Act provides a cause of action to "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any other provision of law (other than this Act) in connection with the 2000 or any later decennial census,

to determine the population for purposes of the apportionment or redistricting members in Congress." Section 209(c)(2) provides that the Report to Congress "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding."

II. CASE IS RIPE FOR REVIEW

As a threshold matter, we note that the judicial review provision contained in the 1998 Appropriations Act eliminated all prudential ripeness concerns. *See Raines v. Byrd*, 117 S. Ct. 2312, 2318 & n.3 (1997). To the extent that the ripeness doctrine has force under Article III, the Supreme Court's precedents clearly demonstrate that this case is ripe for review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

Given the finality of the Department's decision to utilize statistical sampling as a means to determining the population for the purposes of congressional apportionment in Census 2000, it is clear that ripeness concerns have no application in the instant case. The Department has acknowledged the finality of its decisions in its formal written reports submitted to Congress. Likewise, the Department's Operational Plan states that "sampling for non-response will be used to complete the census enumeration." As read in the Appropriations Act of 1998 § 209 (c)(2), the Census 2000 Operational Plan "shall be deemed to constitute *final agency action* regarding the use of statistical methods in the 2000 decennial census," thus making the question of use ripe for adjudication. Appropriations Act of 1998 § 209 (c)(2) (emphasis added).

Defendant's suggests that the case is not ripe because "Congress has not reached its ultimate legislative conclusion regarding a sampling census." Although it is certainly possibly that Congress may seek to prevent the Department from conducting its plan to utilize sampling, there is no legal significance to this observation. Congress may always moot out a controversy by passing new legislation, but that fact does not shield agency action from judicial review. There is always the possibility that settlement or some external event will render a case moot, but that hardly renders the litigation nonjusticiable before that event occurs. If the government's view were correct, then no agency action could ever be reviewed so long as Congress might intervene by passing new legislation that might overrule the final agency determination. *See New York v. United States*, 505 U.S. 144, 175 (1992) (holding case ripe for review even though provision at issue would not take effect until three and a half years after the Court's decision during which time Congress could have repealed the provision); *see also Duke Power Co. v. Carolina Enytl. Study Group. Inc.*, 438 U.S. 59 (1978) (holding that even when the event that would cause the damage had not yet occurred, the claims in the case were still ripe for review); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (holding where no further factual development is necessary to further illuminate the legal issues presented ripeness concerns are not implicated).

In the instant case, Plaintiffs challenge the defendants' use of statistical sampling in connection with the conduct of the census for congressional apportionment purposes. There is no material dispute as to the form that such sampling will take, and this action is justiciable on the merits presenting a question of statutory interpretation.

III. STANDING

In considering a motion to dismiss for lack of standing, the Court must accept all material allegations contained in the complaint as true and must construe all such allegations in favor of standing. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). Moreover, for purposes of determining the standing of Plaintiffs to sue, the Court must assume the validity of Plaintiffs' claim that the Constitution and the Census Act require an actual enumeration and forbid the use of statistical sampling to determine the population for purposes of apportionment. *See Warth v. Seldin*, 422 U.S. at 501.

Plaintiffs clearly satisfy the constitutional requirements for standing imposed by Article III. There are several distinct, concrete injuries that the plaintiffs will imminently suffer if the Department's plan is implemented.

The plaintiffs do not need to prove with mathematical certainty the degree to which they will be injured by the Department's plan, as compared to a head count. Courts have never required such a showing under Article III especially in the context of a motion to dismiss where courts "presume that general allegations embrace those specific facts that are necessary to support [each] claim." *Bennett v. Spear*, 117 S. Ct. 1154, 1164 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). General factual allegations of injury resulting from Defendants' conduct may suffice to establish Plaintiffs' Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 561; *see also Tucker v. United States Dept. of Commerce*, 958 F.2d

1411, 1415 (7th Cir. 1992) (holding requirements of Article III were met in a challenge to the validity of the census where Plaintiffs alleged "some probability of a tangible benefit from winning the suit").

The plaintiffs have demonstrated that they will suffer injury as a result of the Department's plan, because they are able to calculate its effects by reference to the results of the Post-Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000. Courts have consistently found that plaintiffs challenging the census have satisfied the requirements of Article III standing where they have made allegations similar to those contained in the Complaint in this case. *See City of Detroit v. Franklin*, 4 F.3d 1367, 1374-75 (6th Cir. 1993) (holding that plaintiffs had "standing to challenge the defendants' actions based upon their claim that the census undercount will result in a loss of federal funds"); *State of Texas v. Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1990), *rev'd on other grounds*, 653 F.2d 732 (2d Cir. 1981) ("individual plaintiffs in this case have alleged concrete harm in the form of dilution of their votes and decreased federal funds flowing to their city and state, thus establishing their standing"). The requirements of Article III are satisfied where a litigant has a "personal stake in the outcome of the controversy." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Here, Plaintiffs' claims of vote dilution and loss of federal funding meet the requirements of having a personal stake in the outcome of the controversy.

Individual citizens have standing to allege vote dilution resulting from allegedly unlawful legislative apportionment. *See Baker v. Carr*, 369 U.S. 186 (1962) (holding that plaintiffs, Tennessee voters, had a "plain,

direct, and adequate" interest in maintaining the effectiveness of their votes and therefore had standing to maintain the action). Plaintiffs are individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan.

Plaintiffs allege that the plan will dilute the voting strength of Plaintiffs at the intrastate level. Specifically, several plaintiffs reside in counties whose relative population will be diminished by operation of the Department's plan. This "elimination" of population constitutes vote dilution and a tangible injury resulting from the use of sampling. But for this statistical "adjustment," Plaintiffs' counties would have a larger population. When the population of neighboring counties is being increased by the addition of computer generated persons, this injury is compounded. Plaintiffs who reside in counties which will have their population increased by less than the average of the other counties in their state will necessarily suffer a loss in relative political representation.

Plaintiffs allege threatened injury in the form of loss of federal funds, and that the county plaintiffs will suffer a concrete injury as a consequence of the Department's plan. Specifically, Delaware County, Pennsylvania will have its proportional population decreased if statistical sampling is utilized in connection with Census 2000. Under the Post-Enumeration Survey from 1990, Delaware County had its absolute population reduced–the Department subtracted over 2,000 people who had been physically counted–by virtue of the statistical methodology which the Department proposes to utilize in Census 2000. Economic injury resulting

from statistical sampling satisfies the requirements of Article III standing. *See City of Detroit v. Franklin*, 4 F.3d at 1374-75; *City of Willacoochee, Ga. v. Balridge*, 556 F. Supp. 551, 554 (S.D. Ga. 1983).

The Department's failure to conduct a proper enumeration may injure the plaintiffs where in the absence of population figures that comply with federal law, any elections in 2002 will have to be held on the basis of an incorrect number of representatives and malapportioned districts which reflect the 1990 census results. The Department will not be able to conduct a timely and complete, traditional enumeration if its plan is implemented and subsequently invalidated.

It appears to be virtually certain that Georgia will receive at least one additional congressional seat after the completion of a decennial census in the year 2000, regardless of whether the Department's plan or a traditional enumeration is used to conduct the census. Thus, Plaintiffs Matthew Glavin and William Byrne will have their votes diluted if they are forced to participate in an election in 2002 in which Georgia does not have the additional seat in Congress. Thus, Glavin, who resides in Forsyth County, Georgia, which has grown at a rate of 71% since 1990, as compared to an overall growth rate of 15.6% for the state of Georgia, will have his vote diluted in intrastate elections if the 1990 census numbers continue to be utilized beyond the 2000 elections. This same injury will be visited upon the county plaintiffs that have enjoyed a higher rate of population growth than their states since 1990. The population of Cobb County, Georgia, has grown by 23.1% since 1990, as compared to an overall population growth of 15.6% throughout Georgia. Thus, if there is no valid decennial census in place after the year 2000, Cobb County will

receive fewer state and federal funds than it otherwise would if the Department had conducted a lawful census.

Plaintiffs are challenging the procedure by which Defendants intend to take the 2000 census, and it is well-established that a party may "seek[] to enforce a procedural requirement the disregard of which could impair a separate concrete interest[]" and that in such an action, the normal standard of immediacy does not apply. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 572.

Plaintiffs need not await the consummation of threatened injury to obtain preventive relief. *See Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982). Plaintiffs injuries are imminent for several reasons. First, the Department has committed itself to use statistical sampling in Census 2000. The methodology, which parallels that used in 1990 Post-Enumeration Survey, will have the effect of reducing the relative population of those areas in which Plaintiffs reside. Moreover, the county plaintiffs also will be adversely affected by statistical sampling. Second, irrespective of the actual effect of sampling, Plaintiffs will suffer injuries as a consequence of Defendants' failure to conduct a lawful census in a timely manner. This injury appears certain to occur and thus is premature only if a plaintiff must actually suffer a threatened injury prior to obtaining preventive relief. A plaintiff is not required to wait until a defendant engages in unlawful, unconstitutional conduct to have standing to seek judicial redress. *See Blum v. Yaretsky*, 457 U.S. at 991; *Pennell v. City of San Jose*, 495 U.S. 1 (1988); *Bennet v. Spear*, 117 S. Ct. at 1163-64 (holding general allegations of injury satisfy requirements of Article III, and a plaintiff need not allege each specific subsidiary fact that supports its general claim of injury).

Plaintiffs injuries are "fairly traceable" to Defendants' use of statistical sampling in the Census 2000. To satisfy the "fairly traceable" element of standing, a plaintiff need only show that the defendant's conduct complained of is a "but for" cause of the plaintiff's alleged injury. *See Duke Power Co. v. Carolina Enytl. Study Group, Inc.*, 438 U.S. at 59. Here, there is a direct causal connection between Defendants' use of statistical sampling and Plaintiffs' loss of political representation. States are neither constitutionally nor federally compelled to use census data in determining their congressional districts. A state's choice to use such data for this purpose constitutes an "intervening" action that may break the chain of causation between challenged actions and alleged injury. The Supreme Court, however, has held that a defendant's action need not be the "very last step in the chain of causation" to establish that plaintiff's injuries are fairly traceable to defendants' conduct for the purpose of satisfying Article III. *See Bennet v. Spear*, 117 S. Ct. at 1164.

Courts recognize that there is a direct correlation between decennial census population counts and federal and state funding allocations. *See Wisconsin v. City of New York*, 517 U.S. 1, 5-6 (1996) (stating, "The Federal government considers census data in dispensing funds through federal programs to the States. . ."); *City of Detroit v. Franklin*, 4 F.3d at 1374 (stating, "It is undisputed, however, that many federal programs do disburse funds based upon population figures as reported in the decennial census"); *Tucker v. United States Dept. of Commerce*, 958 F.2d at 1415 (stating, "there is no doubt that, as a matter of fact, the allocation of state and federal funds is heavily influenced by census figures. . ."). As a matter of law, allegations of decreased federal and state funding is fairly traceable

to population counts reported in the decennial census. *See City of Detroit*, 4 F.3d at 1374. Plaintiffs affidavits establish that the implementation of statistical sampling in the 2000 census will directly result in a decrease of federal funding to the states and counties in which Plaintiffs reside.

Finally, a favorable decision will redress Plaintiffs' injuries. Redressability focuses on whether judicial intervention will provide an adequate remedy for a plaintiff's alleged injuries. *See Allen v. Regan*, 468 U.S. 737, 753 n.19 (1984); *Warth v. Seldin*, 422 U.S. 490, 502-06 (1975). Courts have held that this element is satisfied where, as in the instant case, a plaintiff challenges the use of census methodology. *See Carey v. Klutznick*, 637 F.2d at 838 (citizens who challenge a census undercount on the basis that improper enumeration will result in loss of funds to their city have established both an injury fairly traceable to the Census Bureau and a substantial probability that court intervention will remedy the plaintiffs' injury). Plaintiffs have satisfied this element.

IV. STATUTORY INTERPRETATION

As recognized by both Plaintiffs and Defendants, aside from the standing and ripeness issues addressed in Defendants' motion to dismiss, the present case can be resolved simply on statutory interpretation.

The interplay of the two provisions of the Census Act, Sections 141(a) and 195 must be interpreted by the Court. Section 141(a) generally authorizes the Secretary to use sampling in conducting various aspects of the census, without an express prohibition. Section 141, entitled "Population and other census information," provides:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date" in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as is necessary.

The Census Act of 1976, 13 U.S.C. § 141(a).

In plain text, Section 195 entitled "Use of Sampling" provides:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

The Census Act of 1976, 13 U.S.C. § 195.

The Supreme Court held in *Ashwander v. TVA*, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Thus, this case can be resolved on statutory basis alone without reaching the Constitutional question.[2] Congress has

[2] The language of the Constitution that mandates a head count of the population is contained in both Constitutional provisions controlling the means of deriving the population figures for Congressional apportionment.

Section 2 of the Fourteenth Amendment states in relevant part that

spoken precisely to the question of statistical sampling by the Department and, in plain language, prohibited the use of this methodology to derive the population used for purposes of congressional apportionment. Thus, the Department's decision to use statistical sampling to create the census population for congressional apportionment purposes, is not authorized by the governing statute.

The Supreme Court has been clear that "[i]t is the 'cardinal principle of statutory construction' . . . 'to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.'" *Bennet v. Spear*, 117 S.Ct. at 1166 (quoting

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

Article I, Section 2, Clause 3 of the Constitution has the same provisions with respect to representatives, as amended by the Fourteenth Amendment mentioned above, and calls the computation of the "respective numbers" an "actual Enumeration" to be made "in such Manner as they [Congress] shall by Law direct."

The argument states that the plain language of the Constitution requires an actual head count because the meaning of the word "count" is "to number" and that an "actual Enumeration" may include statistical sampling.

However attractive deciding the Constitutional question may not [sic] be, and however correct the argument may appear, we are constrained by *Ashwander v. TVA*, 297 U.S. 288, 341, 346-47 (1936) (Brandeis, J., concurring), and do not anticipate a question of Constitutional law in advance of the necessity of deciding it. Neither do we pass upon a Constitutional question, even if properly presented by the record, if there is also present some other ground upon which the case may be disposed of. Thus, our decision is based on construing the relevant statutes, and we do not reach the Constitutional question.

United States v. Menaschem, 348 U.S. 528, 538 (1955) (stating "[t]he cardinal principle of statutory construction is to save and not to destroy")); *see United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 100 (1992). As between two statutory provision concerning the same topic, the more specific section governs the general. "The law is settled that 'however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (stating "it is a commonplace of statutory construction that the specific governs the general . . ."). Thus, the Court must determine the interplay between Section 141 and Section 195 of the Census Act in deciding whether sampling may be used in the Census 2000 to apportion representatives among the states.

Section 141 of the Census Act generally authorizes the Secretary to use sampling in conducting various aspects of the census, without an express prohibition. 13 U.S.C. § 141. A reading of the plain language of Section 141 itself further establishes that Congress' intent was to authorize sampling for numerous purposes of the census other than congressional apportionment. "As used in this section, 'census of the population' means a census of a population, housing, and matters relating to population and housing." 13 U.S.C. § 141(g).

Under 13 U.S.C. § 195, Congress' prohibition against the use of sampling is clear on its face. The statute specifically and prohibitorily states that: "*[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the*

several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." (emphasis added). The language in § 195 makes clear that the "statistical method known as 'sampling'" may not be used for determining the apportionment of Representatives of Congress. 13 U.S.C. § 195. The "except for" language thus plainly imposes a restriction forbidding the sampling method in collecting numbers for apportionment. The restriction is inseparable from the grant of authority to use sampling in other ways.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court confirmed that the "except for" language of § 2 [of the Fourteenth Amendment,] expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony." *Id.* at 43. Similarly, in *Crosby v. United States*, 506 U.S. 255 (1993), the court interpreted a statute requiring the presence of criminal defendants "except as otherwise provided" as constituting an express limitation of the circumstances where a criminal defendant could permissibly be absent. In light of the statute's "express use of the limiting phrase . . . the language and structure of the rule could not be more clear." *Id.* at 259. As such, the "except for" language of Section 195 of the Census Act could not be more clear, expressly exempting from the general authorization of that section any use of sampling for purposes of congressional apportionment.

Defendants' argument that its authority to sample is precisely the same with the "except for" language as it would be if the statute did not contain that language renders the "except for" language devoid of meaning. The Supreme Court has been clear that if possible, a

statute must be construed "in such fashion that every word has some operative effect." *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (rejecting statutory interpretation that "violated the settled rule that a statute's every word has operative effect"); *Bennet v. Spear*, 117 S. Ct. 1154, 1166 (1997) (holding principle of statutory construction is to give effect to every clause and word of a statute); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 100 (1992); *United States v. Menasche*, 348 U.S. 528, 538 (1955). Reading the general authorization for sampling in Section 141 as some how negating the prohibition of sampling for congressional apportionment in Section 195 would render the language of Section 195 meaningless. Rather, the statute must be read to give meaning to both provisions.

To the extent that Sections 141 and 195 could not be reconciled, established principles of statutory analysis require that the "except for" language in Section 195 prevail. Statutory construction governs requiring the more specific section concerning the same topic governs the general. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) ("it is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned. . ."); *Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982). Thus, where Section 195 is a specific statutory prohibition of sampling for apportionment of Congress, it prevails over the more general provisions of Section 141's grant of authority to the Secretary.

In sum, the only plausible interpretation of the plain language and structure of the Act is that Section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes. When viewed in the context of the statute as a whole, Section 141 in no way undermines the definite prohibition of sampling for purposes of apportionment contained in Section 195. As Congress prohibited sampling for purposes of apportionment, the Secretary has no authority to do anything but an actual head count of the population for this purpose.

The conclusive reading of the statute's text on its face ends the Court's task whereas "the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *See Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (stating "[w]hen the words of a statute are unambiguous, [] this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.") (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)). Because the Court finds the reading of section 141(a) and section 195 are clear on its face, the Court finds no need to reach the constitutional questions presented. Therefore, this Court finds that the defendants should be permanently enjoined from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the

population for purposes of congressional apportionment.

An appropriate order shall issue.

Judges Widener and Jackson concur.

/s/ CLAUDE M. HILTON
CHIEF JUDGE CLAUDE M. HILTON

Alexandria, Virginia
September 24, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 98-207-A

MATTHEW GLAVIN, ET AL., PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL., DEFENDANTS

[Filed: Sept. 24, 1998]

ORDER

This matter comes before the Court on the defendants' motion to dismiss and the plaintiffs' motion for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the plaintiffs' motion for summary judgment is GRANTED, and the defendants' motion to dismiss is DENIED, and it is hereby ORDERED that the defendants are permanently enjoined from using any form of statistical sampling, including their program for non-response follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment.

/s/ CLAUDE M. HILTON
CHIEF JUDGE CLAUDE M. HILTON
UNITED STATES DISTRICT COURT

Alexandria, Virginia
September 24, 1992

APPENDIX B

Article I, Section 2, Clause 3 of the United States Constitution provides as follows:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Section 2 of the Fourteenth Amendment to the United States Constitution provides as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legisla-

ture thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,[1] and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 2a of Title 2, United States Code, provides as follows:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of

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[1] See Amendment XIX and section 1 of amendments XXVI.

Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts

in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Section 141 of Title 13, United States Code, provides as follows:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan sub-

mitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If–

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census–

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

Section 195 of Title 13, United States Code, provides as follows:

Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Section 209 of the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2480-2483 (1997), provides as follows:

(a) Congress finds that–

(1) it is the constitutional duty of the Congress to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States;

(2) the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States;

(3) section 2 of the 14th article of amendment to the Constitution clearly states that Representatives are to be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State";

(4) article I, section 2, clause 3 of the Constitution clearly requires an "actual Enumeration" of the population, and section 195 of title 13, United States Code, clearly provides "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.";

(5) the decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs;

(6) it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States;

(7) the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census;

(8) the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted; and

(9) Congress is committed to providing the level of funding that is required to perform the entire range of constitutional census activities, with a particular emphasis on accurately enumerating all individuals who have historically been undercounted, and toward this end, Congress expects–

(A) aggressive and innovative promotion and outreach campaigns in hard-to-count communities;

(B) the hiring of enumerators from within those communities;

(C) continued cooperation with local government on address list development; and

(D) maximized census employment opportunities for individuals seeking to make the transition from welfare to work.

(b) Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to deter-

mine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

(c) For purposes of this section–

(1) the use of any statistical method as part of a dress rehearsal or other simulation of a census in preparation for the use of such method, in a decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress shall be considered the use of such method in connection with that census; and

(2) the report ordered by title VIII of Public Law 105–18 and the Census 2000 Operational Plan shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding.

(d) For purposes of this section, an aggrieved person (described in subsection (b)) includes–

(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action;

(2) any Representative or Senator in Congress; and

(3) either House of Congress,

(e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with Section 2284 of title 28, United States Code. The chief judge of the United

States court of appeals for each circuit shall, to the extent practicable and consistent with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.

(2) It shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any such matter.

(f) Any agency or entity within the executive branch having authority with respect to the carrying out of a decennial census may in a civil action obtain a declaratory judgment respecting whether or not the use of a statistical method, in connection with such census, to determine the population for the purposes of the apportionment or redistricting of Members in Con-

gress is forbidden by the Constitution and laws of the United States.

(g) The Speaker of the House of Representatives or the Speaker's designee or designees may commence or join in a civil action, for and on behalf of the House of Representatives, under any applicable law, to prevent the use of any statistical method, in connection with the decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress. It shall be the duty of the Office of the General Counsel of the House of Representatives to represent the House in such civil action, according to the directions of the Speaker. The Office of the General Counsel of the House of Representatives may employ the services of outside counsel and other experts for this purpose.

(h) For purposes of this section and section 210–

(1) the term "statistical method" means an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference; and

(2) the term "census" or "decennial census" means a decennial enumeration of the population.

(i) Nothing in this Act shall be construed to authorize the use of any statistical method, in connection with a decennial census, for the apportionment or redistricting of Members in Congress.

(j) Sufficient funds appropriated under this Act or under any other Act for purposes of the 2000 decennial census shall be used by the Bureau of the Census to

plan, test, and become prepared to implement a 2000 decennial census, without using statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible. In both the 2000 decennial census, and any dress rehearsal or other simulation made in preparation for the 2000 decennial census, the number of persons enumerated without using statistical methods must be publicly available for all levels of census geography which are being released by the Bureau of the Census for: (1) all data releases before January 1, 2001; (2) the data contained in the 2000 decennial census Public Law 94-171 data file released for use in redistricting; (3) the Summary Tabulation File One (STF-1) for the 2000 decennial census; and (4) the official populations of the States transmitted from the Secretary of Commerce through the President to the Clerk of the House used to reapportion the districts of the House among the States as a result of the 2000 decennial census. Simultaneously with any other release or reporting of any of the information described in the preceding sentence through other means, such information shall be made available to the public on the Internet. These files of the Bureau of the Census shall be available concurrently to the release of the original files to the same recipients, on identical media, and at a comparable price. They shall contain the number of persons enumerated without using statistical methods and any additions or subtractions thereto. These files shall be based on data gathered and generated by the Bureau of the Census in its official capacity.

(k) This section shall apply in fiscal year 1998 and succeeding fiscal years.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 98-207-A

MATTHEW GLAVIN, ET AL., PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL., DEFENDANTS

[Filed: Sept. 25, 1998]

NOTICE OF APPEAL

Pursuant to Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, P.L. No. 105-119, 111 Stat. 2482 (1997), codified at 13 U.S.C. § 141 note, defendants William J. Clinton, in his capacity as President of the United States; the United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census hereby appeal to the United States Supreme Court from the Order and Judgment and Memorandum Opinion filed by this Court on September 24, 1998.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

HELEN F. FAHEY
United States Attorney

/s/ DENNIS E. SZYBALA
DENNIS SZYBALA
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